

FEDERAL COURT OF AUSTRALIA

Li v Minister for Immigration and Citizenship [2007] FCA 1098

IMMIGRATION – appeal from Federal Magistrates Court – refusal to grant appellant permanent spouse visa – no error in Tribunal decision

Li v Minister for Immigration and Citizenship [2007] FMCA 454 referred to
Prasad v Minister for Immigration and Ethnic Affairs (1985) 6 FCR 155 referred to

**XIAO YING LI v MINISTER FOR IMMIGRATION AND CITIZENSHIP AND
MIGRATION REVIEW TRIBUNAL
VID 456 OF 2007**

**KENNY J
3 AUGUST 2007**

MELBOURNE

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

VID 456 OF 2007

ON APPEAL FROM THE FEDERAL MAGISTRATES COURT OF AUSTRALIA

**BETWEEN: XIAO YING LI
 Appellant**

**AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
 First Respondent**

**MIGRATION REVIEW TRIBUNAL
Second Respondent**

JUDGE: KENNY J

DATE OF ORDER: 3 AUGUST 2007

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.
2. The appellant pay the first respondent's costs of and incidental to the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

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Appellant

AND: MINISTER FOR IMMIGRATION AND CITIZENSHIP
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MIGRATION REVIEW TRIBUNAL
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JUDGE: KENNY J

DATE: 3 AUGUST 2007

PLACE: MELBOURNE

REASONS FOR JUDGMENT

BACKGROUND

1 1 This is an appeal from a judgment of the Federal Magistrates Court. The
appellant unsuccessfully sought judicial review following the refusal of a permanent spouse
visa.

2 2 The appellant, Xiao Ying Li, is a citizen of the People's Republic of China.
She married Mr Dinh Chuc Do, an Australian citizen, in China on 1 March 2001. On 6
March 2001, Ms Li lodged a combined visa application for a temporary and a permanent
partner visa. On 8 February 2002, she was granted a temporary partner visa. She arrived in
Australia on 23 March 2002.

3 3 On 29 October 2004, a delegate of the first respondent refused her application
for a permanent spouse visa following an interview on 3 September 2004. The delegate
stated:

*"I am not satisfied that the Applicant and Sponsor have truthfully represented
their meeting and decision to marry. I am not satisfied that the Applicant and
Sponsor share important information to a level that would be expected in a*

genuine relationship. I am not satisfied that the Applicant and Sponsor currently reside together in a spousal relationship. I contend that this relationship has been contrived from the outset for the purposes of obtaining Permanent Residency for the Applicant, and that the Sponsor is assisting her for reasons unknown.”

Ms Li applied to the Migration Review Tribunal (‘the Tribunal’) for merits review of this decision. The Tribunal conducted a hearing on 14 November 2005 and, by letter dated 4 September 2006, notified Ms Li that it had decided to affirm the delegate’s decision. Ms Li applied to the Federal Magistrates Court for judicial review. The Federal Magistrates Court dismissed her application on 8 May 2007. Ms Li appeals to this Court from the judgment of the Federal Magistrates Court.

The Tribunal found that Ms Li was not the “spouse” of the sponsor as required by subclause 100.221(2)(b) of the *Migration Regulations 1994* (Cth) (‘the Regulations’). The Tribunal reached this conclusion after considering factors set out in reg 1.15A(3) of the Regulations and other relevant circumstances, including (1) the financial aspects of the relationship; (2) the nature of the household; (3) the social aspects of the relationship; and (4) the nature of their commitment to one another.

Whilst the Tribunal accepted that Ms Li and Mr Do “represented themselves to family and friends as a couple at the time of decision”, it found that “the financial aspects of the parties’ relationship at the time of decision have not been established”. The Tribunal was not satisfied that the evidence established that they shared a “genuine household” at the time of decision. The Tribunal found that “the evidence that the parties are living together at the time of decision [was] not particularly strong”. The Tribunal found that the evidence rebutted “the presumption in subregulation 1.15A(5)” and that the relationship between Ms Li and Mr Do was not genuine and continuing at the time of the decision. The Tribunal was not satisfied that they “demonstrated a genuine commitment to each other as spouses at the time of decision”. Under the heading “Whether there is a mutual commitment to a shared life as husband and wife to the exclusion of all others”, the Tribunal concluded:

“In this case, the Tribunal observes that the evidence taken as a whole raises doubts as to whether the visa applicant and the review applicant have a mutual commitment to a shared life as spouses to the exclusion of others at the time of decision. After considering the evidence and applying the test outlined in [Minister for Immigration, Local Government and Ethnic Affairs v Dhillon

(unreported, 8 May 1990)], *the Tribunal considers that the factors set out in subregulation 1.15A(3) are not indicative of a spousal relationship at the time of decision. In light of the evidence, the Tribunal is not satisfied that the relationship between the visa applicant and the sponsor is genuine and continuing at the time of decision.*

Accordingly, the Tribunal finds that the visa applicant and the sponsor do not have a mutual commitment to a shared life as husband and wife to the exclusion of all others and that the relationship between them is not genuine and continuing at the time of decision. The Tribunal therefore finds that the visa applicant is not the spouse of the sponsor, an Australian citizen, as that term is defined in regulation 1.15A. As a result, the visa applicant does not satisfy subclause 100.221(2)(b) and she also fails to satisfy subclause 100.221(2) at time of decision.”

7 7 In the Federal Magistrates Court, Ms Li argued that: (1) the Tribunal failed to have regard to a relevant consideration; (2) the Tribunal had regard to an irrelevant consideration; and (3) the Tribunal failed to exercise its powers as required by law. She also sought to challenge the validity of reg 1.15A of the Regulations. In a well reasoned and lucid way, the Federal Magistrate rejected each of these submissions.

8 8 The appeal from her Honour’s judgment raised four grounds. The appellant argued:

9 (a) The Federal Magistrate erred in law in not finding that reg 1.15A of the Regulations is invalid because it is inconsistent with the *Marriage Act 1961* (Cth) (‘the Marriage Act’).

10 (b) The Federal Magistrate erred in law in not finding that the Tribunal failed to have regard to relevant considerations. These considerations were: (1) that Ms Li and Mr Do had persisted with the visa application even when advised by Departmental officers at interview that it would fail; and (2) the duration of their marriage.

11 (c) The Federal Magistrate erred in law in not finding that the Tribunal took into account irrelevant considerations about their financial affairs and sharing a genuine household.

12 (d) The Federal Magistrate erred in law in not finding that the

Tribunal unreasonably failed to exercise its powers under ss 359, 359B and 363 of the *Migration Act 1958* (Cth) ('the Migration Act') to make further inquiries as required by law.

Invalidity of Reg 1.15A

13 9 The appellant argues that reg 1.15A of the Regulations is invalid because it is inconsistent with the Marriage Act. The appellant submits that the Marriage Act is concerned with the circumstances in which there can be a valid marriage and contains a definition of marriage. The appellant contends that since the Migration Act is not concerned with defining marriage but with regulating non-citizens' entry and presence in Australia, reg 1.15A is invalid to the extent that it purports to add requirements to a valid marriage that do not exist in the Marriage Act.

14 10 There are a number of insurmountable objections to this argument. First, reg 1.15A is only concerned with the operation of the Regulations, which are made under the Migration Act. This is made manifest by the opening words of reg 1.15A, which commences "[f]or the purposes of these Regulations". The effect of reg 1.15A is to state the circumstances in which a person is to be considered the spouse of another for the purposes of the Regulations. Pursuant to reg 1.15A(1), to be a spouse of another, for these purposes, a person must be in "a married relationship, as described in subregulation (1A)" or "a de facto relationship, as described in subregulation (2)". Under reg 1.15A(1A), for a "married relationship", two people must be married to each other "under a marriage that is recognized as valid for the purposes of the [Migration] Act" **and** the Minister must be satisfied that they have a mutual commitment to a shared life together to the exclusion of all others; the relationship is "genuine and continuing"; and they live together or do not live apart on a permanent basis. The requirements for a valid marriage under the Marriage Act are relevant but only because of reg 1.15A(1A) and s 12 of the Migration Act. By virtue of s 12 of the Migration Act, the requirement for a valid marriage calls for the application of the Marriage Act, subject to one qualification. Section 12 of the Migration Act provides that:

"For the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the Marriage Act 1961 applies as if section 88E of that Act were omitted."

Further, s 12 of the Migration Act does not pick up the definition of marriage for the purpose of the Migration Act. Section 12 is directed to the limited issue of marriage validity. This is apparent from the opening words of the provision, which state “[f]or the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act”, then certain provisions of the Marriage Act apply.

15 11 Secondly, reg 1.15A is a valid exercise of the regulation-making power conferred by s 31(3) of the Migration Act and reg 1.15A(1A) is an integral part of the definition of spouse for which reg 1.15A provides. Section 31(3) of the Migration Act provides that “[t]he regulations may prescribe criteria for a visa or visas of a specified class”. Regulation 1.15A is part of a group of regulations that operate to prescribe criteria for visas or visas of a specified class. In so doing, reg 1.15A is part of a group of regulations that are directed to the object of the Migration Act, namely, regulating the coming into and presence in Australia of non-citizens: see s 4(1). It is plainly within the purview of s 31(3) to provide for the grant of “partner” visas to persons who are validly married to Australian citizens (or other relevant persons) providing they satisfy the Minister of the nature of their commitment to one another, that they live together or are not permanently separated, and that their relationship is a genuine and continuing one.

16 12 Thirdly, the definition of “marriage” in s 5(1) of the Marriage Act is intended to define this word as it is used in that Act. Section 5(1) of the Marriage Act defines a number of words and phrases as they are used in that Act, but does not purport to define these words and phrases for the purposes of other Commonwealth legislation such as the Migration Act.

17 13 Ultimately, counsel for the appellant narrowed his challenge to focus on the form of reg 1.15A. He conceded that a regulation to much the same effect as reg 1.15A might validly be made but argued that there was error in purporting to define “spouse” and “married relationship” in a way inconsistent with the definition of “marriage” in the Marriage Act. It is plain enough, however, that reg 1.15A does not define the institution of marriage. Instead, reg 1.15A defines who is a “spouse” for relevant purposes, including what is intended by the term “married relationship” for the purpose of this definition. These are at most only cognate concepts. The definition of marriage in the Marriage Act is independent of them.

18 14 There is therefore no inconsistency between reg 1.15A and the Marriage Act. This is enough to dispose of the appellant's first ground of appeal. Even if there were some inconsistency, however, it does not follow that reg 1.15A would be invalid for that reason. The pertinent question is whether the regulation is a valid exercise of the regulation-making power conferred by the Migration Act. It plainly is.

19 15 For these reasons, I discern no error in her Honour's determination that there is no relevant inconsistency and reg 1.15A is not invalid on this account.

Relevant Considerations Argument

20 16 The appellant also submits that the Tribunal failed to have regard to certain considerations that it was bound to take into account, namely:

- the notes of the Departmental interview in September 2004, and in particular the fact that the appellant and the sponsor persisted with the visa application, after having been advised of the option of withdrawing the application or sponsorship; and
- the duration of the relationship at the time of the decision.

21 17 The appellant contends that the first of these matters was relevant by virtue of reg 1.15A(1A)(b), especially 1.15A(1A)(b)(i) concerning the nature of the parties' mutual commitment. The appellant argued that their persistence with their application was not just an item of evidence but an integer of the visa applicant's claim.

22 18 The Tribunal plainly had regard to the notes of the Departmental interview. In its reasons, it not only referred to the Departmental case file, it also discussed what the parties said at the interview. The appellant's complaint is, in substance, that the Tribunal did not draw a particular conclusion from the Departmental notes of the interview. This was that the parties' persistence, notwithstanding the difficulties in their way and the alternative offered them, demonstrated a commitment to one another of the relevant kind. This is in truth a complaint about the merits of the Tribunal's decision and reasoning process. Such a complaint cannot support a finding of jurisdictional error on the Tribunal's part.

23 19 Further, I accept that, as the first respondent submitted, the absence of specific reference to persistence in the Tribunal's reasons does not demonstrate a failure to take into account "all the circumstances of the relationship" for the purposes of reg 1.15A(3). The Tribunal was not obliged to mention the fact that the appellant and her sponsor chose to persist with the application even though the Departmental officers indicated that it would be refused. In the circumstances of the case, the relevance and weight of this matter were entirely for the Tribunal. I agree with the learned Federal Magistrate that:

"[T]he Tribunal was not obliged to give weight to, or mention specifically in its reasons, the evidence about the applicant persisting with the application in the fact of the indications from the delegate that the application would be refused."

See *Li v Minister for Immigration and Another* [2007] FMCA 454 at [27].

24 20 At the hearing of the appeal, the appellant's counsel sought to call into question the conduct of the Departmental officers. This was not raised by the notice of appeal. Nor was it raised in written submissions prior to the hearing. No such argument was advanced or supporting evidence adduced in the Federal Magistrates Court. Nor was the issue raised in the Tribunal. I would not entertain this argument on appeal.

25 21 Further, I would not infer from the Tribunal's reasons and its failure to mention the matter specifically that the Tribunal failed to have regard to the duration of the appellant's and sponsor's relationship. It set out in detail the evidence before it, referring to dates in the course of the relationship. It specifically mentioned that the appellant and sponsor were married on 1 March 2001. It was, thus, clearly aware of the duration of the relationship between them. The Tribunal noted in its reasons, however, that the evidence raised a number of issues on the subject of commitment. These issues arose from such matters as inconsistencies in the evidence regarding the financial and social aspects of their relationship, the nature of their household and living arrangements, as well as their purported reconciliation, the sponsor's failure to inform the appellant of his previous relationship and children, and the appellant's lack of knowledge of the sponsor's medical conditions. The state of the evidence led the Tribunal to state that it was "not satisfied that the visa applicant and the sponsor have demonstrated a genuine commitment to each other as spouses at the time of decision". The Tribunal's reasons do not show that it acted otherwise than in conformity with reg 1.15A(3).

26 22 The appellant's second ground of appeal is therefore not made out.

Irrelevant Considerations Argument

27 23 The appellant submits that, by concluding that “the financial aspects of the parties’ relationship at the time of decision have not been established”, the Tribunal took into account irrelevant considerations. This is because reg 1.15A(3)(a) does not impose any requirements that the appellant and her sponsor combine their financial affairs or share a genuine household. The Federal Magistrate, so the appellant says, was incorrect in characterising the Tribunal’s analysis of the factors as indicative of the relationship and not as the legal test to be met. The appellant also contended that the finding that the Tribunal was not satisfied that the evidence established that the parties share a “**genuine** household” was not in conformity with reg 1.15A.

28 24 Regulation 1.15A(3)(a) required the Tribunal to have regard to the financial aspects of the relationship, including joint ownership of assets and joint liabilities, pooling of financial resources, and sharing of day-to-day household expenses. It was appropriate, as the first respondent submits, for the Tribunal to have regard to “**the parties’ claims** to have combined their financial affairs”. It is apparent from the Tribunal’s reasons that it was concerned with the parties’ own claims in this regard, considered by reference to reg 1.15A, especially reg 1.15A(3)(a).

29 25 Further, no error is shown in the Tribunal’s “genuine household” finding. Reg 1.15A(3)(b) required the Tribunal to consider the nature of the household, including “the parties’ living arrangements and any sharing of responsibility for housework”. Reg 1.15A(1) and (1A) provided the context for this consideration, including the criteria, in reg 1.15A(1A) (b), of genuine and continuing relationship and whether the parties lived together. The Tribunal’s finding rolled up several concepts but does not demonstrate error.

30 26 The Tribunal’s reasons also make it clear that it did not treat any one matter as determinative of the outcome of the application, but reached its decision on the basis of the totality of the evidence. Accordingly, the third ground of the appeal is not made out.

Reasonable inquiries argument

31 27 Finally, the appellant submits that the Tribunal ought to have sought details of the conversations at the Departmental interview between officers of the first respondent and the appellant and her sponsor concerning the withdrawal of the application or sponsorship. There was, so the appellant submits, jurisdictional error in failing to make these enquiries under ss 359, 359B or 363 of the Migration Act. Had the Tribunal investigated, so the appellant says, it may have found that the refusal to withdraw the application or the sponsorship in the face of official hostility indicated a strong level of commitment.

32 28 Both the appellant and the first respondent agree that the Tribunal was not under any general duty to exercise its powers pursuant to ss 359, 359B and 363 to obtain further information. I reject the appellant's submission that this case raised a circumstance of a kind considered in *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155 ('*Prasad*') at 170. It was not obvious that there was any additional material that was readily available and centrally relevant to the Tribunal's decision: compare *Prasad* at 170 per Wilcox J. This was not a case in which the exercise of power was so unreasonable that no reasonable person would have so exercised it in that way.

33 29 I repeat my earlier observations on the matter of persistence. It should be borne in mind that, as stated above, the appellant's alleged persistence with her application in the face of a foreshadowed refusal was not of itself a consideration that the Tribunal was, as a matter of law, bound to take into account. I add that the Tribunal did not apparently rely in its reasons on any of the inconsistencies or discrepancies in evidence given by the appellant and her sponsor at the Departmental interview.

34 30 Accordingly, the appellant's fourth ground of appeal is not made out. For the reasons stated, I would dismiss this appeal with costs.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Kenny.

Associate:

Dated: 3 August 2007

Counsel for the Appellant: Mr A. Krohn

Solicitors for the Appellant: Chua Tan & Associates

Counsel for the First Respondent: Mr C. Horan

Solicitors for the First Respondent: Australian Government Solicitor

Date of Hearing: 30 July 2007

Date of Judgment: 3 August 2007